No. 88-1756

SUPREME COURT, U.S.
FILED
SEP. 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1988

L. STEVEN PLATT,

Petitioner,

v.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

Paul Alan Levy
(*Counsel of Record*)
Alan B. Morrison

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

September 1989

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

TABLE OF CONTENTS

Page

Introduction 1

Rule 11 Incorporation 3

The Required Procedures 4

Rule 38 Test 6

The Big Chill 7

TABLE OF AUTHORITIES

Cases: Page

In re Boucher,
837 F.2d 869 (9th Cir. 1988) 4

Braley v. Campbell,
832 F.2d 1504 (10th Cir. 1987) 3, 4

Brown v. National Board of Med. Exam.,
800 F.2d 168 (7th Cir. 1986) 5

Danik, Inc. v. Hartmarx Corp.,
875 F.2d 890 (D.C. Cir. 1989) 4

Hill v. Norfolk & Western Railway Co.,
814 F.2d 1192 (7th Cir. 1987) 2

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982) 5

Oliveri v. Thompson,
803 F.2d 1265 (2d Cir. 1986) 2

Steffl v. J.I. Case Co.,
862 F.2d 692 (8th Cir. 1989) 3, 4

Page

Textor v. Board of Regents,
711 F.2d 1387 (7th Cir. 1983) 5

Thornton v. Wahl,
787 F.2d 1151 (7th Cir. 1986) 3

Tom Growney Equipment v. Shelley Irrig. Devel.,
834 F.2d 833 (9th Cir. 1987) 5

Webster v. Sowders,
846 F.2d 1032 (6th Cir. 1988) 4

Statutes and Rules:

28 U.S.C. § 1927 3

Federal Rules of Appellate Procedure:

Rule 38 ..... 2, 3, 6

Rule 46 ..... 3, 4, 5, 6

Federal Rules of Civil Procedure:

Rule 11 ..... 3, 4, 5

Miscellaneous:

Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. Pa. L. Rev. 1925 (1989) 5

Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit (1989 ed.) 3

Third Circuit Task Force, *Rule 11 in Transition* (1989) 5

Willging, *The Rule 11 Sanctioning Process* (Federal Judicial Center 1988) 5

In the

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1756

L. STEVEN PLATT,

Petitioner,

v.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

Introduction

The sole opposition filed in this Court has been submitted, not by a party below, but by lawyers representing the respondent United States Court of Appeals for the Seventh Circuit. Far from providing a basis for denying the petition, the 23-page brief crystallizes the difficulties raised by the opinion below, and itself demonstrates why this case is worthy of review.[1]

[1]The Seventh Circuit objects that the United States, rather than itself, should have been named as a respondent with respect to the $1000 fine. However, the Circuit ordered petitioner to deliver the check to its Clerk, and the Solicitor General, who was served with the petition, declined to defend the sanctions here.

(footnote continued)

The brief filed by respondent's counsel carefully reviews the record in a way that the panel itself failed to do in its opinion, and it proposes a number of reasons, most of which not only were omitted from the five-page portion of the opinion imposing sanctions, but are contrary to it, explaining why counsel believe that sanctions could properly have been imposed. In doing so, counsel implicitly concede that the standards invoked and procedures followed below were in error, but they cite other Seventh Circuit cases in which they assert that better procedures and standards have been used. However, an appellate court may not apply proper standards and procedures in some cases, but ignore them in other cases simply because the court is so confident of the result that it feels free to disregard the proper rules, or because, in the words of the Seventh Circuit in another case, the rules would not "assist the court." *Hill v. Norfolk & Western Ry. Co.*, 814 F.2d 1192, 1201 (7th Cir. 1987). Indeed, this Court should grant certiorari for the additional reason of sending a clear message to the courts of appeals that the imposition of punitive sanctions on lawyers is a serious business, that the rules apply in all cases, and that far more care was required than petitioner received here. *See Oliveri v. Thompson*, 803 F.2d 1265, 1281 (2d Cir. 1986) (Pratt, J.)

A recurring theme in respondent's opposition is that the question of whether petitioner should have been sanctioned is fact-bound. In the following pages we dispute respondent's contention that the Questions Presented do not warrant the Court's review, but we do agree that the ultimate question of whether Platt should have been sanctioned is fact-bound, just as any sanctions controversy ultimately turns on the facts of the attorney's conduct and of the

---

Perhaps even more remarkable is the inclusion in respondent's brief of more than six pages of argument on the Rule 38 sanctions, an issue on which the Circuit concedes it is not a respondent. Opp. 8 n.6. Because the appellees below, who were awarded the sanctions, have declined to file a brief in this Court defending their victory, the Circuit's brief on this issue amounts to an amicus brief defending its right to punish lawyers for wasting its time on supposedly frivolous appeals. The Court may wish to consider summarily reversing the Rule 38 sanctions on the ground that the only true respondents have not defended their award.

underlying case. However, the very fact-bound nature of such cases, coupled with this Court's crowded docket, means that an appellate court's decision to impose sanctions is virtually unreviewable on the merits by any higher court. That, in turn, simply increases the obligation of the courts of appeals to adhere strictly to the procedures provided by F.R. App. P. Rule 46 and to due process, and to weigh sanctions issues carefully, as the court below plainly failed to do.

1. *Rule 11 Incorporation*. Respondent denies the existence of a conflict among the circuits on the question of whether Rule 11 applies to the courts of appeals through incorporation into Rule 46. Opp. 15-16, 18. It asserts that it did not rely on Rule 11, but simply used it "to help to define" the terms "conduct unbecoming a lawyer" in Rule 46. Opp. 15-16. In fact, respondent's position is directly contradicted by *Thornton v. Wahl*, 787 F.2d 1151, 1153-1154 (7th Cir. 1986), which directly relied on Rule 11 to grant appellate sanctions, and by the 1989 edition of its own Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit which, at page 35, warns counsel that "the provisions of Federal Rule of Civil Procedure 11, prohibiting groundless assertions and allowing severe penalties for non-compliance, appl[y] to all pleadings filed in the court of appeals." In any event, the distinction on which respondents' counsel rely is mere semantics, given the history of Rule 11, the addition of the 1983 amendments to Civil Rule 11 to supplement the district courts' power to discipline members of their bars, and the absence of any language similar to that in Civil Rule 11 in Appellate Rule 46.

Moreover, contrary to respondent, Opp. 18, in *Braley v. Campbell*, 832 F.2d 1504, 1510 n.4 (1987), the *en banc* Tenth Circuit refused to award sanctions under Rule 38 and 28 U.S.C. § 1927, and in the course of its opinion it considered and rejected the use of Rule 11 as an alternative basis for imposing sanctions. The Tenth Circuit's rejection of this basis for awarding fees on appeal can scarcely be dismissed as mere dictum. Additionally, the Eighth Circuit has recently expressed doubt that Rule 11 can be used in the courts of appeals, although that court ultimately rested its judgment on the fact that no sanctions would be appropriate in that case. *Steffl*

v. J.I. Case Co., 862 F.2d 692, 696-697 n.4 (1989). *See also Danik, Inc. v. Hartmarx Corp.*, 875 F.2d 890, 898 (D.C. Cir. 1989) (court of appeals cannot award fees under Rule 11, although, in affirming Rule 11 fees, it can remand for district court to assess fees for defending the Rule 11 fee award). Coupled with the view of the Sixth Circuit in *Webster v. Sowders*, 846 F.2d 1032, 1040 (6th Cir. 1988), which followed *Braley*, and contrasted with the support given for the Seventh Circuit's view by the Ninth Circuit in *In re Boucher*, 837 F.2d 869, 871 (1988), these cases establish sufficient disagreement among the courts of appeals about the applicability of Rule 11 to appellate procedures, to warrant review by this Court.[2]

2. *The Required Procedures*. Respondent cites several cases, all issued at least a year before the decision below, in which a panel of the Seventh Circuit provided the proper form of notice and opportunity to respond which Rule 46 requires, and it urges that review be denied because there is "no errant practice" below. Opp. 20-21. However, the panel in this case has now plainly held that such notice is not required, a holding that its counsel concede puts the Seventh Circuit at odds not only with its fellow circuits, but also with Rule 46.

But the "formalities and terminology of Rule 46," Opp. 20, do not exist merely for the convenience of the courts, to be employed or disregarded as the members of a particular panel see fit. Moreover, despite respondent's assertion that its practices are

---

[2]Respondent's lawyers try to excuse their client's misquotation of petitioner's brief below in the portion of its ruling imposing sanctions on petitioner for his miscitation of the record and of other opinions, Pet. 8 n.2, by stating that the court "reasonably interpreted" the brief to imply the words that the panel placed in quotation marks. Opp. 19 n.13. They then root through the record to find two additional examples of allegedly sanctionable phrases from petitioner's brief. Opp. 19-20, ¶¶ 3 and 4. However, counsel cannot alter what respondent said by giving their interpretation of it. Moreover, these additional items were not mentioned in the opinion below as a reason to impose sanctions. Nor were they discussed at the oral argument that, respondent now asserts, was Platt's notice and opportunity to respond. Accordingly, neither of these defenses can be relied on here.

generally proper, the fact is that numerous commentators do not share this benign view, and have singled out for criticism the Seventh Circuit's cavalier attitude toward due process in the sanctions process. *E.g.*, Third Circuit Task Force, *Rule 11 in Transition* 31 (1989); Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. Pa. L. Rev. 1925, 1958-1962 (1989) (copies of the page proofs of this article have been lodged with the Clerk); *see also* Willging, *The Rule 11 Sanctioning Process* 89-90 (Federal Judicial Center 1988).[3]

Perhaps even more frightening than the opinion itself are the alternate forms of notice that respondent claims are adequate in the Seventh Circuit. According to the Opposition, at 21, the opportunity to file a petition for rehearing, after the court has already published a final decision awarding sanctions, provides adequate due process protection. *See also Brown v. National Bd. of Med. Exam.*, 800 F.2d 168, 173 (7th Cir. 1986). However, most precedent requires *prior* due process, before three members of the court have made up their minds. *E.g.*, *Tom Growney Equip. v. Shelley Irrig. Devel.*, 834 F.2d 833, 837 (9th Cir. 1987) (Rule 11); *Textor v. Board of Regents*, 711 F.2d 1387, 1395-1396 (7th Cir. 1983), *see also* Third Circuit Task Force, *Rule 11 in Transition* 29, 32-34 (1989) (citing several circuits); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982) (pre-deprivation hearing is required unless quick action is needed or pre-deprivation process is impractical). Therefore, the contention that rehearing satisfies Rule 46 and due process creates another conflict and further justifies granting certiorari.

Finally, respondent relies on the fact that both opposing briefs accused petitioner of misstating the record and the law, which, its counsel assert, was enough to put him on notice of the possibility

---

[3]This attitude toward the procedural rights of attorneys facing sanctions is also shown by the fact that the Seventh Circuit routinely erased the tape of the oral argument that its amended opinion describes as Platt's chance at due process. The tape is available for this Court's review only because Platt happened to buy a copy of the original before it was destroyed. *See* the addendum to this brief (letter from respondent's counsel describing the circumstances).

of Rule 46 discipline. That approach, we suggest, is positively terrifying because appellate briefs routinely challenge the other side's characterization of the law and the facts, sometimes in very strong terms. A Rule 46 notice to show cause is issued only after the court has made some threshold determination that sanctions may be appropriate, and thus warns the lawyer named in the notice that a brief must be filed defending his conduct. But a party that hopes to distract its adversary's attention from the merits has no incentive to decide whether a misrepresentation ought to be punished, as opposed to being simply disregarded, before objecting to a characterization of the record or the law. If every claim that a lawyer misstated the record were to become the equivalent of a notice from the court that sanctions were in the air, that would significantly raise the stakes in virtually every appeal to include the question of whether opposing counsel ought to be punished, thus making appellate practice as unpleasant and personal as much district court litigation has already become.[4]

3. *Rule 38 Test.*-Respondent defends its award of sanctions under Rule 38 by insisting that it applies a two part test, first requiring a finding that the result be obvious or the argument clearly be without merit, and second that the appeal have been pressed with no reasonable expectation of success and "for purposes of delay or harassment or sheer obstinacy"; respondent cites a number of its own decisions and the decisions of other courts to show an alleged consensus on this formulation. Opp. 9-10. Petitioner's quarrel is not with respondent's formulation, but with the fact that the opinion below found both factors to be satisfied *solely* because, accor-

[4]The solution to this problem posed by respondent's counsel is to impose Rule 38 sanctions on appellees who file frivolous motions for sanctions. Opp. 11, *citing* Seventh Circuit cases. We leave for another day the question of how Rule 38, which provides for sanctions for frivolous *appeals*, authorizes the imposition of sanctions on persons for filing frivolous motions for damages under Rule 38. However, the apparent ease with which such counter-deterrents are created in the Seventh Circuit provides further reason for concern that, in the Seventh Circuit, "where there's a will to impose sanctions there's a way," even if no rule grants the necessary authority.

ding to the panel, petitioner had repeated arguments that the district court had found wanting. Pet. App. 8a, 9a. Indeed, there was no evidence whatsoever bearing on any of the motives that petitioner had in filing the appeal, let alone that his purpose was for delay; after all, what did he hope to delay, and what could a lawyer handling a contingent fee case hope to gain by filing a frivolous appeal? As a result, the application of an alleged second factor appears to add nothing to the "repetition" factor that respondent essentially concedes is far too strict to be sustained on its own.

Respondent's counsel now place much emphasis on petitioner's alleged failure to address the reasoning of the district court in his brief below and on his alleged misrepresentations of the evidence in support of the finding that the appeal was frivolous. Opp. 12-13. If these characterizations of petitioner's briefs below were accurate, they might bear on whether the appeal was without any basis. However, respondent's opinion did not rely on either alleged fault, but rather rested solely on the claim that petitioner had simply repeated his arguments made in the district court, despite the fact that petitioner repeatedly criticized the district court's reasoning. *See* Brief for Appellant at 7 ¶ 2, 9 ¶¶ 2 and 3, 10 ¶¶ 2 and 3, 11 ¶ 2, 12 ¶ 1, 13 ¶¶ 2 and 3, 14 ¶ 1, 15 ¶ 1 and 2, 16 ¶ 1 (respondent has lodged copies of the briefs below with the Clerk). Although the court below obviously rejected these attacks on the district court's opinion, respondent's counsel are simply wrong in contending that petitioner's arguments below ignored the district court's opinion.

4. *The Big Chill*. Had the court of appeals filed its counsel's opposition to this petition as its opinion imposing sanctions, petitioner would have had a more difficult case, because, although the sanctions would still be erroneous, it would be less clear that significant questions were presented concerning the standards and procedures that apply to appellate sanctions. However, it is the Seventh Circuit's opinion, not its brief, that has precedential effect, and other attorneys who read the opinion below and the other cases we cited in our petition will be severely chilled by the Seventh Circuit's crusade to discipline lawyers appearing before it, particularly when

representing plaintiffs in unpopular cases such as civil rights suits. Indeed, the *amicus* Chicago Council of Lawyers plainly says that its members have already been chilled.

In our adversary system, lawyers play a vital role in providing access to justice for all Americans, a role that is in many ways unique in the world. The Court should grant review in this case not simply to correct the particular errors in the decision below, which we believe are many, but to emphasize that before punishing lawyers for alleged misconduct in litigation, the courts themselves must proceed in a manner that is beyond reproach, adhering strictly to the Rules of Civil and Appellate Procedure that have been adopted by this Court and subjected to scrutiny by Congress. If those Rules are to be changed, that must be done by using the procedures provided by law for securing amendments, not by judicial fiat.

Respectfully submitted,

Paul Alan Levy
(*Counsel of Record*)
Alan B. Morrison

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

September 1989

ADDENDUM

MAYER, BROWN & PLATT
190 SOUTH LA SALLE STREET
CHICAGO, ILLINOIS 60603

WASHINGTON
LONDON
NEW YORK
HOUSTON
LOS ANGELES
TOKYO LIAISON OFFICE

312-782-0600
TELEX 190404
FACSIMILE
312-701-7711

WRITER'S DIRECT DIAL NUMBER
312-701-7078

FILE NUMBER

JAMES D. HOLZHAUER
MEMBER OF THE DISTRICT OF COLUMBIA BAR

August 8, 1989

Paul Allan Levy
Public Citizen Litigation Group
2000 P Street, N.W.
Suite 700
Washington, D.C. 20036

Re: *Platt* v. *United States Court of Appeals*

Dear Paul:

As I mentioned on the telephone this afternoon, we will be representing the Seventh Circuit in this matter. The clerk has informed us that the audio tape of the oral argument has been erased. He explained that the tapes are routinely re-used after the Court issues its mandate.

I would be most appreciative if you would send me a copy of the recording you made from the Court's tape. I am sure the Court will gladly reimburse you for any reasonable costs you incur.

Sincerely,

/s/ Jim
James D. Holzhauer

JDH:cml